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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DOLEN R. BEGALLA, Plaintiff and Respondent, v. DEPARTMENT OF MOTOR VEHICLES, Defendant and Appellant.	B150043 (Los Angeles County Super. Ct. No. OVN 01125)

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell Block, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Bill Lockyer, Attorney General, Elizabeth Hong, Supervising Deputy Attorney General, and Brian D. Vaughan, Deputy Attorney General, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

The Department of Motor Vehicles of the State of California appeals from an order denying its motion pursuant to Code of Civil Procedure section 473 to set aside a writ of mandate granted by the superior court in favor of Dolen Begalla. We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

On February 26, 2000, Begalla was arrested for driving under the influence of alcohol. On April 14, in ".08% BAC Administrative Per Se Notification of Findings and Decision," the Department suspended Begalla's driver's license for one year. On May 30, 2000, the Department issued an order suspending Begalla's license for two years based on a finding that he had previously been convicted of driving under the influence of alcohol.

On August 30, 2000, Begalla filed a petition for writ of mandate seeking to overturn the two-year suspension. In the petition, Begalla argued that the police report of his arrest was internally contradictory and that the two-year suspension of his driver's license constituted double jeopardy.

A notice setting a hearing on the petition for October 16, 2000, in Division 100 of the superior court (Van Nuys) was served by mail on the "Department of Motor Vehicles" in Sacramento. The Department did not appear at the hearing, at which the writ was granted. The written order on the writ recites, among other things, that Begalla presented evidence at the hearing, that the court found that it had jurisdiction, and that there had been "contradictory sentences imposed" by the Department.

In December 2000, the Department filed a motion for relief from default under Code of Civil Procedure section 473, asserting that it had not received notice of the October 16, 2000 hearing. The Department further requested that the proceeding be transferred to the central district based on local rules requiring a petition for a writ of mandate to be filed in the writs and receivers departments (Nos. 85 or 86) of the superior court, which are located in the central district.

In support of the first assertion, the Department explained that, under Vehicle Code section 24.5, process in civil actions involving the Department is to be "served upon the director or his appointed representatives." Dena Ruiz declared as follows: "I

am employed by the California Department of Motor Vehicles as a Legal Assistant, in the Legal Affairs Division, Sacramento, California. As such, I am authorized under Vehicle Code section 24.5 to accept service on behalf of the Director. I have conducted a thorough search of this department and I find no evidence that [Begalla's counsel] notified this department of the hearing date of October 16, 2000, on the Dolen R. Begalla case." The Department argued that it would have appeared to oppose Begalla's writ petition had it received notice of the hearing, and that Code of Civil Procedure section 1088 precludes a writ from being granted by default.

The Department's motion was heard on January 5, 2001. Following argument, the trial court ruled as follows: "In this case, [Begalla] served the [Department]. Proof of service was filed. The fact that the declarant [Ruiz] who has not been produced, so she's not subject to any examination by the court or by [Begalla's] counsel, has said that she searched the files and can't find anything is totally consistent with this court's previous dealings with the [Department] where they can't find anything and they claim whatever they want to claim. The fact that the petition was not brought in Department 85 or 86 is moot at this point since this court is a superior court department and took the jurisdiction without any objection being lodged by the [Department] or its representative. [¶] Petition as ordered and granted on 10/16 — that order remains in effect."

DISCUSSION

Analogizing this case to *Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, the Department contends that the trial court abused its discretion in denying relief under Code of Civil Procedure section 473. The analogy fails.

Bonzer was a police officer with the Huntington Park Police Department who failed to get a promotion he sought. After being denied an administrative appeal, he filed a petition for writ of mandate in superior court, seeking an order requiring that an appeal hearing be conducted. Bonzer served separate notices of hearing on the petition on the city, its civil service commission, and its chief of police. The city did not appear at the scheduled hearing date and the trial court granted the requested writ. The city later moved under Code of Civil Procedure section 473 to have the writ set aside on the

ground that it had not received notice of the hearing. The motion was denied and the city appealed. (*Bonzer v. City of Huntington Park, supra,* 20 Cal.App.4th at pp. 1476–1477.)

The *Bonzer* court noted that service by mail had been effected pursuant to section 1013a, subdivision (3).[1] (20 Cal.App.4th at p. 1478.) Evidence Code section 641 creates a presumption that a letter correctly addressed will be received in the ordinary course of mail. The *Bonzer* court continued by quoting Evidence Code section 604, as follows: "'The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and *until evidence is introduced which would support a finding of its non-existence*, in which case the trier of fact shall determine the existence or non-existence of the presumed fact from the evidence and without regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate.'" (20 Cal.App.4th at p. 1479, italics in original.)

The *Bonzer* court then reviewed the contents of six declarations that had been submitted by the city in support of its motion. These included the declaration of the secretary of the city's chief of police, who "described how she was the only person who received the chief's mail. She opened it, date stamped it, and personally gave it to the chief. She did not receive a notice of the . . . hearing." (20 Cal.App.4th at p. 1479.) The secretary later conducted a search of the office and did not find the notice. (*Ibid.*) The city clerk declared that she also had not received the notice of hearing and had not found it in a subsequent search for the document. The city's chief administrative officer declared that he also had not received the notice. He asked every member of his staff

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[1] Code of Civil Procedure section 1013a, subdivision (3), was also the method of service by mail in this case. Under the statute, a declarant making service does not attest to actually mailing a document. Rather, the declarant states that he or she is "readily familiar" with the practice of the law firm making service for processing correspondence, and that such practice is to deposit mail with the United States Postal Service on the date specified for service with postage fully prepaid.

whether they had seen such a notice, and none responded in the affirmative. (*Id*. at pp. 1479–1480.) "This evidence of no actual notice was neither impeached nor contradicted." (*Id*. at p. 1480.)

The *Bonzer* court concluded: "Upon presentation of [the city's] detailed, credible, and unimpeached evidence of no actual notice—the *presumption* of such notice (Evid. Code, § 641) ceased to exist. (Evid. Code, § 604.) The only remaining effect of the 'Proof of Service' declaration was to enable the trial court to draw 'any inference that may be *appropriate*.' (*Ibid*.) [¶] Any inference, in the face of [the City's] declarations, that the subject notices were actually received is, as a matter of law, *inappropriate*. [Citations.] It was a clear abuse of discretion for the trial court to deny [the City's] section 473 motion." (20 Cal.App.4th at p. 1481, italics in original.)

In contrast to *Bonzer*, there is a lack of detail and a concomitant lack of persuasiveness in the single declaration submitted by the Department in support of its motion. In her three-sentence submission, Ruiz failed to explain who else in the Department might have been authorized to accept service, or to set forth the parameters of her purported "thorough search of this department." In short, there is nothing in this terse, skeletal presentation that would inspire confidence in the Department's assertion that it never received Begalla's notice of hearing.

In the face of this inadequate declaration, the trial court impliedly found that the presumption of Evidence Code section 641 had not been rebutted. We see no basis upon which to fault that finding. Moreover, the Department has failed to demonstrate that the trial court lacked jurisdiction to grant the writ, or that it issued a "default" judgment within the meaning of Code of Civil Procedure section 1088.[2]

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[2] Code of Civil Procedure section 1088 provides that a peremptory writ "cannot be granted by default." It further provides that "[t]he case must be heard by the court, whether the adverse party appears or not." The instant record reflects that Begalla's writ petition was heard by the court. The absence of the Department at the hearing does not render the resulting order a ruling made by default.

"'The burden of establishing excusable neglect is upon the party seeking relief who must prove it by a preponderance of the evidence.' [Citation.] But '. . . a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits.' [Citation.]" (*Bonzer v. City of Huntington Park, supra,* 20 Cal.App.4th at p. 1478.) We have carefully scrutinized the order denying relief to the Department. However, unlike *Bonzer*, there was nothing inappropriate in the trial court's rejection of the request for relief under Code of Civil Procedure section 473. Accordingly, the order denying relief must be affirmed.

DISPOSITION

The order under review is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.